



October 8, 2002

Ms. Myrna S. Reingold  
Galveston County Legal Department  
4127 Shearn Moody Plaza  
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Galveston, Texas 77550-1454

OR2002-5672

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 170414.

The Office of the Galveston County Clerk (the "clerk"), which you represent, received a request for copies of compact disks ("CDs") that the clerk received from Data Tree Corporation ("Data Tree").<sup>1</sup> The CDs contain digitized copies of the clerk's official real property records. You make no arguments on behalf of the clerk against public release of the requested copies, but you explain that Data Tree objects to the clerk fulfilling the request. You notified Data Tree of the request in accordance with section 552.305 of the Government Code.<sup>2</sup> Data Tree responded to the notice and contends that the clerk cannot honor the request because to do so would violate copyright law and would not be in accordance with Data Tree's understanding of its arrangement with the clerk. Data Tree also asserts that the

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<sup>1</sup>The request also sought other information. We understand, however, that the other requested information was released to the requestor. This decision thus addresses only the above-described request for copies of compact disks.

<sup>2</sup>See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances).

requested information is excepted from required public disclosure by sections 552.104 and 552.110 of the Government Code. The requestor has submitted comments to this office urging release of the requested information. *See* Gov't Code § 552.304 (a person may submit written comments stating why information should or should not be released). We have considered the submitted comments and arguments and we have reviewed the submitted sample of information.<sup>3</sup>

Before addressing the arguments and exceptions asserted by Data Tree, we must address certain procedural matters. The deadline under the Act to request an open records ruling from this office is "not later than the tenth business day after the date of receiving the written request." Gov't Code § 552.301(b). In requesting such a decision, certain information must be submitted to this office "not later than the 15<sup>th</sup> business day after the date of receiving the written request." *See* Gov't Code § 552.301(e). The clerk did not comply with these deadlines.<sup>4</sup> If a governmental body fails to comply with section 552.301, section 552.302 states that the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 630 (1994). A "compelling reason to withhold the information" that is sufficient to overcome the section 552.302 release requirement is limited to instances where the law prohibits the governmental body from releasing the information, or its release will harm third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). In this case, Data Tree contends that copyright law prohibits the clerk from fulfilling the request and that release of the information will harm its competitive interests. As these contentions would constitute compelling reasons sufficient to overcome the section 552.302 release requirement, we proceed to address Data Tree's arguments and asserted exceptions.

We first address Data Tree's copyright argument. In pertinent part, section 552.228 of the Government Code provides:

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

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<sup>3</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>4</sup>You state that the clerk received the request in February 2002. However, no decision was sought from this office until correspondence from you dated August 2, 2002.

- (1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;
- (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
- (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

Gov't Code § 552.228(b). Here, the information on the CDs constitutes information that exists in an electronic medium and the requestor has requested copies in that medium. Accordingly, the above provision requires the clerk to provide a copy in the requested medium if the clerk "has the technological ability" to produce such a copy, the clerk "is not required to purchase any software or hardware to accommodate the request," and if by providing such a copy, the clerk "will not violate the terms of any copyright agreement" between the clerk and a third party. We have no information to indicate that the first two of these three conditions are not met. Accordingly, we find that the clerk "shall provide a copy in the requested medium" if doing so will not violate a copyright agreement between the clerk and a third party. Data Tree argues that this condition is not met because the CDs are subject to copyright protection:

The CDs created by Data Tree and provided to [the clerk] are copyrighted materials of Data Tree. It is of no consequence that no copyright notice was included in the CDs, as copyright is secured *automatically* when the work is created, and notice of copyright *may, but is not required*, to be included in the work.

We agree with Data Tree that the protection of copyright law is not generally contingent on whether the work contains a copyright notice, nor is it generally contingent on whether the work has been registered with the U.S. Copyright Office. *See, e.g., Raquel v. Educ. Management Corp.*, 196 F.3d 171, 176 (3d Cir. 1999) (failure to register a work does not invalidate the copyright, but rather, it precludes any infringement actions on that work until a valid registration is obtained). However, an essential element of copyright protection is originality. The federal copyright statute provides that copyright protection is available for "*original* works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (emphasis added). The U.S. Supreme Court has explained this requirement of originality:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works),

and that it possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. . . . Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, *not the result of copying*.

*Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) (emphasis added, citations omitted). Our review of the submitted information, as well as the representations made to this office, clearly indicate that the information at issue consists entirely of *copies* of public records. Other than the difference in the method of storage of the information, the information on the CDs is the same as the information on the source microfilm.<sup>5</sup> The latter information comprises public records that are not subject to copyright protection. The requested information is a copy of these public records. The creation of the requested information involved only copying, and thus did not require “at least some minimal degree of creativity.” We have no indication that any of the information on the CDs constitutes “original works of authorship,” and we accordingly conclude that the information is not copyrightable. Thus, we have no basis to conclude that the clerk providing the information to the requestor would violate any copyright agreement between the clerk and Data Tree.

Data Tree states that under its arrangement with the clerk, “Data Tree did not intend to provide the CDs to [the clerk] for the purpose of allowing any competitors of Data Tree to copy those CDs and thereby cause Data Tree substantial competitive harm and give the competitor(s) an unjust and unfair competitive advantage.” The Act requires the clerk to “treat all requests for information uniformly without regard to the position or occupation of the requestor [or] the person on whose behalf the request is made.” Gov’t Code § 552.223. The Act also provides that the clerk is not responsible “for the use made of the information by the requestor.” *Id.* § 552.204(1). A governmental body cannot, by agreement, overrule or repeal provisions of the Act. *See, e.g.*, Attorney General Opinion No. JM-672 at 2 (1987). Thus, even if the clerk agreed to Data Tree’s understanding of its arrangement with the clerk, we conclude that any such agreement would not be enforceable to the extent it conflicts with the Act. Thus, we next address the exceptions to disclosure under the Act that Data Tree has asserted.

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<sup>5</sup>The Act provides that the media on which public information is recorded includes “film” as well as “a magnetic, optical, or solid state device that can store an electronic signal.” Gov’t Code § 552.002(b)(2), (3). Thus, for purposes of the Act, the difference between the storage medium for the information on microfilm versus the information on CD is of no consequence.

Data Tree asserts that the clerk may withhold the information based on section 552.104 of the Government Code. This provision states in pertinent part that information is excepted from required public disclosure “if it is information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of the section 552.104 exception is to protect the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the clerk does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov’t Code § 552.104 may be waived by governmental body). Therefore, we conclude that the requested information may not be withheld under section 552.104.

Data Tree also asserts section 552.110(b) of the Government Code. This provision excepts from required public disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). This office has held that the words “commercial or financial information” as used in section 552.110(b) refer to information that relates to the financial or commercial condition of the person or entity that provided the information to the governmental body. Open Records Decision No. 550 at 5 (1990). The information at issue here does not constitute such “commercial or financial information.” It is merely copies of public records of the clerk that reveal nothing about the commercial or financial condition of Data Tree. We thus conclude that none of the information at issue is excepted from required disclosure by section 552.110(b).

In summary, as no exceptions to required public disclosure under the Act have been demonstrated to apply, the requested information is not excepted from required public disclosure under the Act and it must be released. Pursuant to section 552.228(b) of the Government Code, the clerk “shall provide a copy” of the requested information to the requestor “in the requested medium.”

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

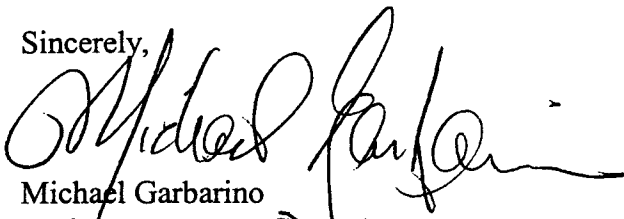
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 170414

Enc. Submitted documents

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